THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	
This Document Relates To: MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. ENRON CORP., et al., Defendants.	**Civil Action No. 01-CV-3624** **And Consolidated Cases**

DEFENDANTS' OPPOSITION TO LEAD PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

INTRODUCTION

After volunteering to serve as Lead Plaintiff in this case, the Regents of the University of California ("Regents") now seeks a protective order to insulate itself from the discovery necessary to test its suitability to serve as class representative under Fed. R. Civ. P. 23. Regents has produced only a single witness who, as expected, knew next to nothing about Regents' extensive experience as a customer with Enron Energy Services, Inc. ("EES") throughout the class period.[1] Through this business relationship, Regents knew first-hand much of the

[1] Contrary to expectations, however, he also acknowledged again and again that he could not answer basic questions regarding Regents' investment decisions and the information that its investment officers obtained from Enron executives.

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information described in the *Newby* Complaint as "true but concealed facts" about EES. This business relationship—and the unique access to information that it afforded—sets Regents apart from the class that it seeks to represent.

Regents urges that it is an adequate and typical class representative in part because it was deceived by particular untruths or omissions regarding Enron Energy Services. *See, e.g.*, First Amended Compl. (*Newby* Complaint) ¶¶ 38, 121(g), 155(f), 214(f)-(g), 300(f)-(g), 339(f)-(g). The "true facts" purportedly "concealed" include that: "EES was actually losing hundreds of millions of dollars. . . . Enron was entering into energy management contracts which it knew would likely result in huge losses." (¶ 38); that EES "faced insurmountable hurdles," because (1) it could not realize "economies of scale" and a make a profit on account of its individualized contracts, (2) EES lacked "sufficient infrastructure to do the monthly billing", and (3) EES's upgrades to customer's facilities required upfront capital expenditures that were uneconomical and guaranteed losses on contracts; and that it was "impossible for EES to enter into contracts that extended beyond three years and accurately forecast energy costs or savings because of the variables related to these contracts." *Id.* ¶¶ 121(g), 214(g), 300(g), 339(g). But as a customer of EES, Regents had direct, first-hand experience of the very business practices that the *Newby* Complaint alleges were fraudulently concealed. This contractual relationship between Regents and EES thus raises obvious issues regarding whether Lead Plaintiff had actual or constructive knowledge with respect to EES superior to that of the market and is therefore atypical, inadequate or subject to unique defenses, including non-reliance, disclosure or estoppel.

The discovery dismissed by Lead Plaintiff as "vexatious" and "irrelevant" is not a fishing expedition. Nor is it intended to burden or harass Regents.[2] It is both minimal and narrowly tailored to focus squarely and exclusively on facts relevant to Regents' adequacy and typicality as a representative plaintiff.[3] Defendants seek the deposition of a single representative witness who can testify regarding (1) the energy services contract between Regents and EES; and (2) meetings between Regents and Enron or EES.[4] *See* Exs. 1 and 2 (30(b)(6) Notice and Request for Production of Documents). Reasonably in advance of that deposition, Defendants are also entitled to production of documents, now long overdue, concerning these same subjects.[5]

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[2] Defendants have worked in good faith to resolve these discovery issues. Although Regents refused to provide overdue documents prior to Mr. Heil's deposition, to designate a person to address Regents' business relationship with Enron, or to postpone the deposition until Regents had complied with its discovery obligations, defendants nonetheless agreed to take Mr. Heil's deposition on the understanding that the Court would have to resolve this dispute and further testimony may be necessary.

[3] Courts have consistently ensured defendants sufficient discovery to probe these issues before making a decision on class certification. *See, e.g., Chateau de Vill Prods., Inc. v. Tams-Witmark Music Library, Inc.*, 586 F.2d 962, 966-67 (2d Cir. 1978) (reversing certification of class because certifying court refused to permit defendant to take class discovery); *Adams v. Brookshire Grocery Co.*, No. 6:98CV00462, 1999 U.S. Dist. LEXIS 21907, at * 20 (E.D. Tex. Feb. 8, 1999) ("a certain amount of discovery was usually necessary to determine the proper scope of the class action issue").

[4] The 30(b)(6) notice specified that the defendants will inquire concerning the negotiation of the contract, the nature and quality of the services provided, including any purported deficiencies in EES's performance, and contract disputes and litigation. *See* Ex.1 (Frevert's 30(b)(6) Notice, items 1-3). Items 4-6 of the 30(b)(6) Notice are no longer in dispute, because Regents ultimately designated Mr. Heil to testify regarding those matters. Ex. 3, Letter from Helen Hodges to Jacks C. Nickens, August 21, 2003.

[5] Lead Plaintiff has not produced any documents in response to the request served by Mr. Pai on July 2, 2003 for documents concerning the UC/CSU Energy Services Contract, which noted expressly that the request was made in connection with class certification. *See* Ex. 2, Request No. 1 (seeking documents corresponding to items 1-3 of Mr. Frevert's 30(b)(6) Notice). In its August 2, 2003 response, Regents admitted to having in its possession "hundreds of thousands" of pages of potentially responsive materials. Ex. 4, Regents' Responses to Request For Production of Documents No. 1. Although the Motion for Protective Order and the related correspondence allude to other documents produced by Regents, Regents has yet to produce a single page in response to Mr. Pai's document request. To the contrary, Regents has admitted that its prior production was limited to its Office of the Treasurer, but that the documents

I. Regents' Unique Relationship With Enron Must be Investigated Before a Class Can Be Certified.

Unlike most of Enron's public shareholders, Regents was one of EES's largest customers. *See* Ex. 5, Testimony of Regents' Maric Munn, *et al.* ("UC/CSU are one of EES's largest direct access customers."); Ex. 6, Joint Press Release. On February 19, 1998, Regents and the Board of Trustees of the California State University entered into a fixed-price energy contract with EES.[6] This contract spanned the entire proposed class period. The parties estimated that the contract would require electricity sales of $300 to $500 million and would save Regents an estimated $2.4 million per year. Ex. 6. Not only would EES supply electricity to nine Regents' campuses, it would also provide a host of energy-related services, including scheduling, metering, billing, information retrieval and reporting, demand management planning, and power sales services. Ex. 7. In February 2001, during the California energy crisis, EES decided to return all of its California customers, including Regents, to utility service, while still providing them with price discounts. Regents responded by suing EES for breach and seeking specific performance. Ex. 8, Complaint for Preliminary Injunction. While the appeal was pending, the parties negotiated a settlement that extended the Contract for an additional two years.

On these facts alone, Regents' unique knowledge of EES and its business practices would be a proper subject of class certification discovery. Here, however, defendants can establish an even stronger foundation for the narrowly focused discovery that they have sought:

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concerning the contract with EES are located within the files of the Office of the President, from which no documents have yet been produced. *See, e.g.*, Mot. for Protective Order at 3. Indeed, if Regents has its way, the documents will not be produced until days before the current discovery cutoff, precluding their use in the deposition of Regents' class certification representatives.

[6] *See* Ex. 7, Direct Access Services Agreement by and between The Regents of the University of California and the Trustees of the California State University ("UC/CSU Energy Services

- **First, Regents had extraordinary access to Enron executives, far exceeding that of the typical public shareholder.** Investment officers from Regents' Office of the Treasurer (Arild Holm and Satish Swamy) had private meetings and conversations with executives of Enron Corporation, as well as EES. These included two visits to Enron for private meetings with company executives, including defendants Skilling, Buy and Pai (among others), prior to stock purchases here at issue.[7] Additionally, the members of Regents' Office of the President responsible for facilities management visited EES's headquarters in Houston, where they met with EES senior personnel. *See* Ex. 9, Plaintiffs' Response to Interrogatory No. 1.

  Such access to executives is atypical, and defendants are plainly entitled to discover from knowledgeable sources what occurred and what information was obtained by Regents. *See, e.g., Grace III v. Perception Tech Corp.*, 128 F.R.D. 165, 168 (D. Mass. 1989) ("Personal contact with corporate officers and special meetings at the company will render a plaintiff atypical to represent the class."); *In re Health South Corp. Sec. Litig.*, 213 F.R.D. 447, 460 (N.D. Ala. 2003) (continued opportunities throughout class period to have direct conversations with individual defendants subjects plaintiff to unique reliance defenses).

- Second, among the "true but concealed facts" alleged in the *Newby* Complaint is the repeated allegation that EES faced an "insurmountable hurdle" in that it "did not have sufficient infrastructure to do the monthly billing." Compl. ¶¶ 214(g), 300(g), 339(g).

  Regents acknowledges, however, that it experienced first-hand the evolution of EES's billing process and understood its infrastructure. Indeed, Regents has asserted that it personally experienced "numerous material deficiencies in EES's performance under the Contract, including billing and metering services." *See* Ex. 9, Response to Interrogatory No. 4. Indeed, according to

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Contract"). "Direct Access" service is electric service provided to a retail customer by an energy service provider rather than a local utility.

[7] *See, e.g.*, Ex. 10, May 15, 2000 Office of Treasurer Recommendation, REG002676 – REG002683 ("Mr. Jeff Skilling made it clear in a private conversation that he is not happy with Enron's progress in the region [of South America]. . . . Satish and I met with their Chief Risk Officer, Rick Buy, who explained to us Enron's risk management policies. . . . Rick shared with us the organizational chart and outlined the different departments. . . . Satish was surprised they did not have an Operational Risk department. Rick did express that he is always apprehensive of something 'blowing up' at a remote trading location."); Ex. 11, Office of Treasurer's Arild Holm's Notes entitled, "ENE 4/6/00 Visit w[ith] company in Houston." REG002394-REG002398. At his deposition, 30(b)(6) designee Jeffrey Heil identified these notes and others as those of Arild Holm. Throughout his testimony, Heil indicated that Holm, who was Regents' Oil and Gas Natural Resources Analyst, has the most direct knowledge about Regents' investment in Enron and had the most direct contact with top Enron executives. *See e.g.*, Ex. 12 at 96-97;105, 109, 112, 117-118, 128, 155, 163, 178, and 220.

Regents, these problems were almost continuous throughout the class period. Regents contended in the 2001 litigation that, from the inception of the Contract, it encountered persistent difficulties in changing its hundreds of accounts from utility service to Enron Direct Access Service, and "campuses received inaccurate, incomplete, and duplicative bills, . . ." Ex. 13, Decl. of Dian M. Grueneich ¶14. When those billing problems were resolved after more than a year of collaborative efforts, Regents then complained of new ones, including the failure to bill many of the Universities' large accounts since July 2000. *See* Ex. 14, Email from Regents' Maric Munn, dated March 6, 2002. Regents later requested an audit, noting that it had received late and inaccurate invoices since January 2001. Ex. 15, 2002 Amended Request for Qualifications for Performing Billing Audit.

Regents' facilities management department appears to have brought these issues to the attention of its investment officers early in their program of investment in Enron. Arild Holm's notes suggest that Gary Matteson, Regents' Director of Facilities responsible for oversight and management of the UC/CSU Energy Services Contract, briefed him on June 6, 2000 regarding "[s]tumbles on strategic energy plans and billing."[8] And the following day, Mr. Holm was made aware of discussions between Regents and EES concerning "Billing/Metering Issues," including the ad hoc nature of the procedures.[9]

None of this however, deterred Regents from accumulating Enron stock during the same period. *See* Ex. 18, Amended Certification dated May 21, 2003.

- Third, Regents repeatedly asserts in the *Newby* Complaint that it was defrauded because Enron failed to disclose that EES customized its offerings and could not achieve sufficient economies of scale. "[T]rue but concealed facts [include]: . . . because each customer's contract was individualized, there were no economies-of-scale and the cost of performance precluded making a profit." Compl. ¶¶ 214(g), 300(g), 339(g).

  Here, too, Regents' own experience appears to preclude any claim of deception. **Regents knew first-hand that EES tailored its contracts to fit the specific needs articulated by its customers because Regents itself took advantage of this service.** Ex. 19 at 17, Response to Request For Admission No. 18 (admitting that Regents and EES entered into a "unique contract" that was "closely tailored" to needs of Regents' campuses). In fact, Regents sued EES for specific performance of the energy services contract in 2001 precisely because EES's services were "unique," stating in its brief on appeal: "[T]he Agreement involves unique services, including meter installation and maintenance, billing, energy load information retrieval and reporting, and scheduling coordinator services, as well

[8] Ex. 16, Arild Holm's notes entitled "Gary Matteson on ENE 6/6/00," REG002624.
[9] These notes include the comments "not an established process for ENE [Enron] . . .everything made on the fly." Ex. 17, ENE 6/7/00 UC/CSU EES Meeting, REG002408-REG002411.

as a stable source of energy at a below tariff rate, which cannot be remedied by money damages." Ex. 20, Regents' Appellee Brief at 2, 36.

As an EES customer, Regents was also uniquely situated to appreciate the complexity of its projects and to witness the level of effort and dedication that EES devoted to its customer service. As Regents asserted in the 2001 litigation, "The services that Enron provides under it [the UC/CSU Contract] reflect a sophisticated integration of electric commodity, metering, billing, load information, strategic planning, and other activities vital to meeting the Universities' goal of achieving a strategic and comprehensive approach to their electricity use." Ex. 13, Decl. of Dian M. Grueneich ¶¶ 10-11. *See also* Ex. 5, Testimony of Regents' Maric Munn *et al.* ("For nearly four years, the Universities and EES have refined the complex interaction required under their contract and coordinated the immensely difficult operation of servicing nearly 2,000 University accounts spread throughout the state.")

Finally, EES expressly advised Regents that it individualized its customer offerings. Notes taken by Regent's investment officer Arild Holm during a private meeting with defendant Lou Pai in the course of Regents' April 6, 2000 visit record the comment "All deals = very highly customized." Ex. 11, REG 002394-99 at 002395; *see also* Ex. 12 at 118-22. Thus, Regents can hardly pretend to have been surprised to learn that EES provided individualized services.

- Fourth, Regents includes among the purportedly "true but concealed facts" an allegation that it did not know that EES was losing money on certain retail contracts. *See, e.g.*, Compl. ¶ 155(f).

  However, **during its 2001 litigation, Regents was served directly with pleadings disclosing that EES was incurring significant monetary losses, estimated to reach $144 million over the next year because of the UC/CSU Energy Services Contract alone.** Ex. 21, Decl. of Evan G. Hughes ¶ 7.[10] This increased credit risk did not escape the notice of Regents' Office of the Treasurer; an April 11, 2001 news article about the contract litigation produced from its files bears the handwritten notation "$144 mm unhedged revenue." Ex. 23, REG002544-REG002545. There are indications that Regents further used its dual status as a major investor in Enron and as a customer of EES to seek information on this subject simultaneously from Regents' internal counsel responsible for the contract litigation and from Enron. *See, e.g.*, Ex. 24, REG002553-REG002554; Ex. 25, REG002428.[11]

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[10] Enron further informed Regents that, "The Universities will save more than $60 million over the life of this contract, yet Enron continues to bear the risk which results in the potential loss of tens of millions of dollars while it continues to be a good corporate citizen and fulfill ALL its obligations to the Universities." Ex. 22, Enron's Opp. at 1.

[11] Heil referred defendants to Mr. Holm, as to the substance of his conversations with Enron executives, Regents' officials, and analysts. *See, e.g.*, Ex. 12 at 218-20.

EES not only disclosed its losses, but also explained in detail to Regents the precise way in which EES was losing money as a result of the California energy crisis and the failure of the California utilities to make certain promised payments. In its pleadings, Enron made this point clear: "Utilities stopped paying Enron rebates due by law, and Enron bore the brunt of the Utilities' own failures." "Because Enron is paying the Utilities the full price and rebating the Universities five percent of the 1998 frozen tariff price, Enron will likely lose money for the remainder of the contract, even after the switch to Utility supply." "Obviously, neither Enron nor the Universities could have foreseen during negotiations the odd confluence of factors in the California energy market that has made resourcing the majority of University accounts to the Utilities the rational economic choice (specifically, the failure of the Utilities to pay direct access providers like Enron millions of dollars in rebates required by law). . . ." *Id.* at 5-7, 20-22. Furthermore, Enron employee Dennis Benevides averred, "As a result of the Utilities[']] failure to pay these 'negative CTCs' to Enron, Enron has paid millions of dollars more for its energy for its direct access customers than it has been compensated by the utilities." Ex. 26 ¶ 20.

Regents responded by insisting on the benefit of its bargain with EES, thereby **profiting at the expense of the same Enron shareholders that it now seeks to represent.** Regents stated: "Enron's failure to find adequate financial hedges was self-inflicted economic harm. . . . [N]either the Universities nor the public should [] pay the price." Ex. 27, Regents' Reply, at 7, 13.

Mr. Heil testified that he and Mr. Holm considered this information and concluded that it was immaterial to Regents' investment in Enron. *See* Ex. 12 at 260-61. Regents chose to maintain its existing portfolio and to continue to purchase stock. *See* Ex. 18.

- Fifth, another of the purportedly "true but concealed facts" alleged in the *Newby* Complaint is that it "was impossible for EES to enter into contracts that extended beyond three years and accurately forecast energy costs or savings because of the variables related to these contracts." Compl. ¶ 121(g). **But Regents, billing itself as an expert in the area of energy, publicly endorsed such long-term contracts** and joined Enron in advocating regulatory reform aimed at encouraging such arrangements. *See* Ex. 28, Interview with Gary Matteson, *available at* http://www.ucop.edu/facil/eps/newsletterjanuary2001.pdf ("I think the Legislature needs to pass bills that (1) ensure long-term contracts to reduce price volatility . . . ."); Ex. 29, Press Release, UC Brings Expertise to Bear On Energy Crisis.

II. Discovery Regarding Regents' Unique Business Relationship With Enron Is Necessary To Assess Whether Regents Should Be Disqualified As A Representative Plaintiff Because Of Vulnerability To Unique Defenses, Such As Non-Reliance, Disclosure, and Estoppel.

The Court can take no comfort in Lead Plaintiff's facile assurance that the UC/CSU Energy Services Contract "has no bearing on the typicality of The Regents' claims in this action." Mot. for Protective Order at 5. That assertion ignores Rule 23(a)(3) jurisprudence on typicality – including this Court's own analysis in appointing Regents as Lead Plaintiff. Under well-established authority, a plaintiff that is potentially subject to unique defenses cannot serve as a class representative, and defendants may therefore legitimately inquire into facts that could suggest that Regents is subject to unique defenses. *See, e.g.*, *Gary Plastic Packaging Corp. v. Merrill Lynch, Lynch Pierce, Fenner & Smith*, 903 F.2d 176, 179 (2d Cir. 1990); *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 59-60 (2d. Cir. 2000); *J.H. Cohn & Co. v. American Appraisal Assoc.*, Inc., 628 F.2d 994, 999 (7th Cir. 1980) (class certification denied where putative class representative was subject to a unique defense and "this may well have resulted in less attention to the issue which would be controlling for the rest of the class"); *Koos v. First Nat'l Bank of Peoria*, 496 F.2d 1162, 1164 (7th Cir. 1974) ("Where it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative."). The "critical inquiry is whether [the putative representative's] energies will be spent defending against unique or atypical issues arising from [its] intimate familiarity [with company]." *In re Firstplus Group, Inc., Securities Litigation*, Civ. No. 3:98-cv-2551-M, 2002 U.S. Dist. LEXIS 20446, at * 14 (N.D. Tex. Oct. 23, 2002) (citing *In re Enron Corp. Securities Litig.*, 206 F.R.D. 427, 456 (S.D. Tex. 2002)). Because courts routinely deny class certification or deny representative status to a proposed class representative who had special access to information by virtue of an independent

relationship with the defendant company not shared by other class members, such relationships are inherently relevant to class certification, and defendants must be free to take discovery concerning the relationship in question.[12]

Indeed, in selecting Regents as Lead Plaintiff in this case, this Court recognized that even an attenuated business relationship may give rise to unique defenses and therefore preclude a plaintiff from serving in a representative capacity. *See In re Enron Corp. Securities Litig.*, 206 F.R.D. 427, 456 (S.D. Tex. 2002). Thus, the Court rejected the Florida State Board of Administration ("FSBA") as Lead Plaintiff in this case because the Court could not "[i]n good conscience" "endanger this litigation by ignoring the issues created by FSBA's *unique involvement with Enron*." *Id.* (emphasis added). As the Court noted, "'whether ... [the unique] defenses will be successful is of no matter. The fact that plaintiffs will be subject to such defenses renders their claims atypical of other class members.'" *Id.* (quoting *Landry v. Price Waterhouse Chartered Accountants*, 123 F.R.D. 474, 476 (S.D.N.Y. 1989)). In the case of

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[12] *See, e.g.*, *Grace III*, 128 F.R.D. at 169 ("Personal contact with corporate officers and special meetings at the company will render a plaintiff atypical to represent the class."); *Zandman v. Joseph*, 102 F. R.D. 924, 930-31 (recognizing availability of unique defense of non-reliance and atypicality of plaintiff who had "personal contacts" with company officers and an employee of a potential customer of the company); *Endo v. Albertine*, 147 F.R.D. 164, 168 (N.D. Ill. 1993) (access to financial and operational data of corporate office and operating companies rendered putative plaintiff subject to unique defenses); *Baffa*, 222 F.3d at 59-60 (affirming denial of class representative status to "sophisticated broker who had access to more information than other investors in the putative class"); *In re Health South Corp. Sec. Litig.*, 213 F.R.D. 447, 460 (N.D. Ala. 2003) (documented conversations with defendants and their continued opportunities throughout the class period to have direct conversations with individual defendants during the proposed class period subjects proposed plaintiffs to unique reliance defenses) ("knowledge of material facts that defendants allegedly failed to disclose provides a defense to a cause of action under 10(b)-5"); *Anderson v. Bank of the South*, 118 F.R.D. 136, 148 (M.D. Fla. 1987) ("Because of extensive personal investigation, including discussion with insider . . . the court concludes that defendants have made a sufficiently substantial showing that . . . [the class representative's] claims are atypical."); *Glick v. E.F. Hutton*, 106 F.R.D. 446 (E.D. Pa. 1985) (named plaintiff's claim atypical where premised substantially on oral representations based on inside information).

FSBA, the relationship of its investment manager, Alliance Capital, to Enron gave rise to the possibility that FSBA had actual or constructive knowledge of some of the matters alleged in the complaint to have been fraudulent. Therefore, the Court disqualified FSBA as a representative plaintiff because "the relationship between Alliance Capital and Enron could make FSBA subject to unique defenses because knowledge, actual or constructive, of [Alliance Capital partner and Enron director Frank] Savage and the Board of Directors about off-balance sheet partnerships used to hide Enron's debts and artificially inflate its earnings, i.e., insider information, might be imputed to FSBA. If so, FSBA may not have a securities fraud claim for much of its investment because its investment decision-maker was not deceived." *Id.* If this Court was prepared to disqualify FSBA from consideration as Lead Plaintiff, surely the defendants are entitled to take discovery on the issue of Regents' business relationship with Enron.

Regents cannot contend that its own potential vulnerability to unique defenses is irrelevant, because Regents itself sought FSBA's disqualification as an inadequate representative precisely on these grounds. Regents argued that FSBA was "Subject to Unique Defenses as Its Purchases of Enron Stock Were Made by Alliance Capital Management, Which Knew About the Enron Fraud at the Time of Purchase." Ex. 30, The Regents of The University of California's Opposition To The Competing Motions For Lead Plaintiff, dated Jan. 22, 2002, at 27. Regents even claimed that "Savage's dual role as an executive with the FSBA's investment manager and potential defendant/director of Enron subject the FSBA to the unique defense that FSBA traded in Enron shares ***despite*** its investment manager's knowledge that the statements that form the gravamen of the complaints against Enron were false." *Id.* at 29 (emphasis in original). Regents urged the Court to reject FSBA, because of the "***threat*** that the FSBA is subject to unique defenses" (emphasis in original). It emphasized that "[t]his policy issue [of unique

defenses] is even more compelling in light of the monumental litigation effort this case will require, and the overwhelming public interest and scrutiny in the outcome of this case." Ex. 30 at 23. Regents cannot now take the clearly inconsistent position that modest inquiry during discovery into Regents' *own* unique defenses is irrelevant to its own adequacy.[13]

The record developed to date in this case more than justifies further inquiry into whether Regents is qualified to prosecute the *Newby* claims as a representative plaintiff. These issues may be couched in terms of typicality, adequacy, vulnerability to unique defenses, or the existence of issues that may divert time and resources from the common issues, but, however conceptualized, they lie at the heart of class certification. *See General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.") Lead Plaintiff Regents cannot gloss over the potential significance of the extensive contractual relationship between Regents and EES, given its relationship to the allegations in *Newby*. Discovery is not only warranted, it is required.

III. The Court's March 28, 2003 Order Does Not Prohibit Relevant Discovery on Class Certification Issues.

Nor should Regents be allowed to re-write history to suggest that the Court's March 28, 2003 Order bars inquiry into relevant topics for evaluating Regents' typicality and adequacy. In

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[13] *See, e.g., In re Coastal Plains*, 179 F.3d 197, 205 (5th Cir. 1999); *Century Products Company v. COSCO*, Civil Action No. 3:00-CV-0800-BH, 2003 U.S. Dist. LEXIS 1419 (N.D. Tex. Jan. 31, 2003); *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (party may be estopped from assuming inconsistent litigation positions).

that Order, the Court found expressly that the proposed depositions addressed therein were "not relevant to the class certification issues of the typicality of the Regents' claims or the adequacy of representation." Order, dated March 28, 2003, *In re Enron Corp. Securities Litig.*, H-01-3624 (S.D. Tex. Mar. 28, 2003). The Court also found that Jeffrey Heil was the appropriate deponent because he was "the most knowledgeable" on the subject of Regents' investment decisions and investment policies. *Id.*[14] Neither of these findings applies to the instant discovery.

Regents admits repeatedly, in correspondence and in its Motion for Protective Order, that **Mr. Heil is not the most knowledgeable witness as to Regents' contract with EES**. *See, e.g.*, Ex. 31, Letter to Helen J. Hodges from Deborah J. Jeffrey, August 19, 2003; Ex. 32, Letter from Helen J. Hodges to Deborah J. Jeffrey and Jacks C. Nickens, August 20, 2003; and Mot. for Protective Order at 3. Regents has in fact candidly acknowledged that Mr. Heil "cannot address" the items in the 30(b)(6) notice concerning UC/CSU Energy Services Contract and expressly declined to designate him to testify on those subjects. *See* Ex. 32. Of course, although Mr. Heil evidently knows little or nothing about the EES contract, Regents nonetheless offered to allow the defendants to question him about it if they chose. *Id.* Even so, Regents refuses to produce the overdue documents relating to this contract until two weeks after Mr. Heil's deposition. *See, e.g.*, Mot. for Protective Order at 6 ("The Regents is further collecting the responsive, non-

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[14] Regrettably, Mr. Heil did not prove to be as knowledgeable as Lead Plaintiff described him during the hearing on March 27, 2003. *See* Transcript of Hearing on March 27, 2003, Exhibit K to Affidavit of Ms. Hodges in support of Motion for Protective Order at 36-38 (representing Mr. Heil to be the person most knowledgeable regarding the acquisition of Regents' Enron stock). During his deposition, Mr. Heil repeatedly indicated that Mr. Arild Holm was more familiar than he with the specifics of Regents' investment in Enron and the communications between Regents and Enron regarding that investment. *See, e.g.*, Ex. 12 at 96-97, 105, 109 and 155. **Heil acknowledged throughout his deposition that he could not answer the relevant questions put to him about Regents' investment decisions, but rather his colleague Arild Holm, who**

privileged documents concerning the energy contract it agreed to produce and expects to produce the documents within two weeks.") Thus, this testimony regarding the EES contract and the communications between Regents and Enron is neither cumulative nor repetitive.

Moreover, the subject matter of the testimony sought goes directly to the heart of the typicality and adequacy of Regents as a representative plaintiff, topics that must be considered by the court when deciding whether to certify a class. *See, e.g., Berger v. Compaq*, 257 F.23d 475, 479 (5th Cir. 2001). The express language of Rule 30(b)(6) requires a corporation to produce knowledgeable persons on relevant subjects. There can be no question that the information sought is relevant under the criteria of Rule 23. The discovery requested is not cumulative nor unduly burdensome. It is narrowly tailored to the task at hand, and there is no justification for Regents' efforts to frustrate this legitimate inquiry.

CONCLUSION

For the foregoing reasons, defendants Mark A. Frevert and Lou L. Pai respectfully urge that The Regents' Motion for a Protective Order be denied and request instead that this Court endorse the attached Order, to safeguard the defendants' right to discovery regarding Regents' typicality and adequacy to serve as a class representative.

Dated: September 3, 2003

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was directly responsible for the recommendation of investing in Enron stock and who managed its performance, would be far more knowledgeable and better able to respond.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served by sending a copy via electronic mail to serve@ESL3624.com on this the 3RD day of September, 2003.

I further certify that a copy of the foregoing document has been served via Certified Mail/Return Receipt Requested on the following, who does not accept service by electronic mail on this the 3RD day of September, 2003.

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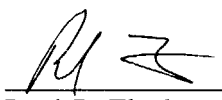

Paul D. Flack

16530v1

The Exhibit(s) May

Be Viewed in the

Office of the Clerk